STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM P. IRWIN, doing business as IRWIN POTATO FARMS and CYNTHIA R. IRWIN,

Plaintiffs-Appellants,

V

MUTUAL SERVICE CASUALTY INSURANCE and CROP HAIL MANAGEMENT, INC.,

Defendants,

and

DURUSSEL AND DURUSSEL, INC. and MATTHEW DURUSSEL,

Defendants-Appellees.

UNPUBLISHED
June 19, 2003

No. 237615
Saginaw Circuit Court
LC No. 93-056041-NZ

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiffs William P. Irwin, doing business as Irwin Potato Farms, and Cynthia Irwin appeal by right costs and attorney fees awarded to defendants under MCR 2.405(E). We affirm.

We review the trial court's interpretation and application of court rules de novo as a question of law. *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332, 336; 602 NW2d 596 (1999). "However, a trial court's decision whether application of new court rules would work injustice under MCR 1.102 entails an exercise of discretion." *Id*. An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

MCR 2.405(E), which explains the relationship between offers of judgment and mediation, was amended effective October 1, 1997 to provide that "[c]osts may not be awarded

under this rule in a case that has been submitted to mediation under MCR 2.403 unless the mediation award was not unanimous."[1] See *Reitmeyer, supra* at 335.

Plaintiffs first argue that amended MCR 2.405(E) applies retroactively, citing *Reitmeyer, supra* at 342-345. There, we applied the "injustice exception" authorized by MCR 1.102 to the amended version of MCR 2.405(E) in deciding whether to retroactively or prospectively apply the rule. *Id*. at 345. The general rule is that the newly adopted court rules apply to pending actions unless there is reason to continue applying the old rules. *Id*. at 337, citing *Davis v O'Brien*, 152 Mich App 495, 500; 393 NW2d 914 (1986). An injustice does not merely occur because the new rules would change the result. *Davis, supra* at 501. Rather, a new court rule would "work injustice" where a party acts, or fails to act, in reliance on the prior rules, and the party's action or inaction has consequences under the new rules that were not present under the old rules. *Id*. See also *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 355; 480 NW2d 623 (1991).

A decision under MCR 1.102 requires a case-by-case determination whether "injustice" would result from the application of the amended version of MCR 2.405(E). *Reitmeyer, supra* at 345. This determination should be based on the substance of the rule involved, the timing of a party's actions, a party's obvious gamesmanship, if any, and a party's reliance or lack of reliance on the rules as they existed at the time the party made the pertinent decisions in the case, and any other pertinent factors. *Id*.

In the instant case, all offers of judgment exchanged between the parties and the original jury verdict occurred before the MCR 2.405(E) was amended. Therefore, by the time the new rule took effect, there were no mediation awards or offers of judgment still pending. Thus, plaintiffs had every reason to believe that if the case went to trial, the trial would be over and any sanctions would be awarded under the old court rules. *Reitmeyer, supra* at 343-345. Consequently, the trial court's conclusion that applying amended MCR 2.405(E) retrospectively would cause injustice and not further its goal was not an abuse of discretion.

Plaintiffs next contend the trial court abused its discretion by awarding sanctions to defendants because defendants "never made a serious attempt to settle the case, and simply played games with this system for tactical advantage." We disagree.

The "interest of justice" exception appears to be directed at remedying the possibility that a party's offer of judgment constituted gamesmanship, rather than as a sincere effort at negotiation. *Luidens v 63rd Dist Court*, 219 Mich App 24, 35; 555 NW2d 709 (1996). The parties may make a token offer of judgment after an unfavorable mediation evaluation to avoid mediation sanctions under MCR 2.403 or make a de minimus offer of judgment early in a case in the hopes of tacking attorney fees to costs if successful at trial. *Id*., citing *Sanders v Monical Machinery Co*, 163 Mich App 689, 692; 415 NW2d 276 (1987). Awarding attorney fees when gamesmanship of this sort occurs does not further MCR 2.405's purpose of encouraging

[1] MCR 2.405(E) was further amended, effective August 1, 2000, to replace the word "mediation" with "case evaluation."

settlement. *Luidens*, *supra* at 35. Therefore, evidence of gamesmanship, as demonstrated by comparisons of offers to the mediation evaluation and jury verdict, constitutes a relevant factor in determining whether the exception applies. *Id*.

The trial court here did not compare defendants' offers of judgment with the mediation evaluation although defendants' offers of judgment represented only two percent of the mediation evaluation. However, the trial court found no evidence of gamesmanship and noted that, ultimately, defendants' perceived value of plaintiffs' claims was a closer approximation than plaintiffs.' Plaintiffs' claim for error is based solely on the differential between defendants' offers of judgment and the mediation evaluation. Although this Court has considered large differentials evidence of gamesmanship, *Luidens*, *supra* at 35, that evidence is not necessarily proof of gamesmanship. The trial court did not err by granting sanctions to defendants under MCR 2.405(E).

Plaintiffs also contend that under MCR 2.405(D), sanctions may be imposed only if the action was resolved by a verdict, and that the term verdict only refers to an "award rendered by a jury or by the court sitting without a jury, excluding costs and interests." However, in *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 599; 552 NW2d 523 (1996), we held that a directed verdict is a verdict for purposes of MCR 2.405(A)(4).

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder